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BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

JAMES M. STEFFENS,	)	
	)	
Appellant,	)	PCHB No. 92-1
	)	
v.	)	
	)	
STATE OF WASHINGTON,	)	FINAL FINDINGS OF FACT,
DEPARTMENT OF ECOLOGY,	)	CONCLUSIONS OF LAW
	)	AND ORDER
Respondent.	)	
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This matter came on for hearing on April 3, 1992, in Lacey, Washington, before the Pollution Control Board, John H. Buckwalter, Administrative Law Judge, presiding, with Board Members, Chairman Harold Zimmerman and Annette McGee in attendance.

At issue was the Washington State Department of Ecology's (DOE) denial of appellant's Surface Water Application No. S2-27737.

Appearances were:

James M. Steffens, pro se for appellant  
Kerry O'Hara, Assistant Attorney General, for DOE.

Proceedings were recorded by Leah M. Yates, Certified Court Reporter, of Spanaway, Washington, and were also taped. Witnesses were sworn and testified, exhibits were admitted and examined, and arguments of Counsel were heard. From these, the Board makes these

FINDINGS OF FACT

I

Appellant (hereinafter Steffens) owns and has owned for

1 approximately three years a one acre (approximate) lot with residence  
2 on Kyro Road S.E., Lacey, Thurston County, Washington. The lot abuts  
3 Long Lake, and the domestic water supply system for the residence is a  
4 well with storage tank.

## 5 II

6 Steffens has attempted to use the well water source for watering  
7 his lawn at various times in the past but claims that the system's  
8 output capacity is inadequate for that purpose unless extensive and  
9 expensive modifications to the pump and/or storage tank are made. He  
10 also expresses concern that the withdrawal of well water could be  
11 detrimental to his neighbor's drinking water supply since, he alleges,  
12 both he and his neighbor draw well water from the same aquifer.  
13 However, he could not cite any time that his neighbor had ever  
14 complained or otherwise remarked about a problem caused by any  
15 previous use of well water by Steffens for watering his lawn.

## 16 III

17 On or about April 19, 1990, Steffens filed Application No.  
18 S2-27737 with DOE asking for a permit to withdraw water from Long Lake  
19 in the amount of .03 cubic feet per second for irrigation of  
20 approximately half his lot, .5 acres. The system described in the  
21 application consisted of a pump (or pumps), piping, and forty  
22 sprinkler heads.

1 IV

2 Long Lake is closed to any further withdrawal of water for  
3 domestic use unless the property owner has no other water source.

4 Only one water withdrawal permit has been granted by DOE since  
5 Long Lake was closed, and that was conditioned on immediate cessation  
6 of withdrawal whenever Woodland Creek dropped to a critical level.

7 V

8 On July 9, 1991, DOE personnel conducted a field investigation  
9 and recommended disapproval of the application on the grounds that  
10 Steffens did not qualify for exemption from the general prohibition  
11 because he has another water source, his water well.

12 DOE also submitted the application to the Washington State  
13 Department of Wildlife which recommended disapproval because Long Lake  
14 is a tributary to Woodland Creek. The Creek is also closed to  
15 withdrawal of water for domestic use because it occasionally dries up  
16 creating a detrimental effect on certain fish species which live in  
17 the stream.

18 VI

19 By certified mail dated December 23, 1991, DOE informed Steffens  
20 that his application was denied, and he filed this appeal with the  
21 Board in a timely manner.

22 VII

23 Any Conclusion of Law deemed to be a Finding of Fact is hereby  
24

25 FINAL FINDINGS OF FACT,  
26 CONCLUSIONS OF LAW AND ORDER  
27 PCHB NO. 92-1

(3)

1 adopted as such. From these Findings of Fact the Board makes these

2 CONCLUSIONS OF LAW

3 I

4 This Board has jurisdiction over the parties and the subject  
5 matter of this appeal. Chapters 70.94 and 43.21B RCW. Because this  
6 is an appeal of the denial of a permit, the appellant has the burden  
7 of proof.

8 II

9 The governing regulations from which the Board draws its  
10 Conclusions of Law are:

11 WAC 173-513-040 Surface water source limitations to further  
12 consumptive appropriations.

13 (1) The department of ecology, having determined that  
14 further consumptive appropriations would harmfully impact  
15 instream values, closes the following streams and lakes to  
further consumptive appropriation for the periods  
indicated.

16 A list of closures following this statement includes Long  
17 Lake, a tributary to Woodland Creek, with a closure period of "All  
18 year". Woodland Creek itself is also listed as being closed.

19 The Board concludes that this WAC, if it stood alone, would  
20 justify the denial of Steffens' Application with no further  
21 consideration.

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25 FINAL FINDINGS OF FACT,  
26 CONCLUSIONS OF LAW AND ORDER  
PCHB NO. 92-1

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III

However, other WACs offer relief from permit denial under certain conditions.

One such WAC is 173-513-060:

*...Withdrawals of water...shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.*

A concern of Steffens which might be considered as relevant to the public interest was the possible detrimental effect that the use of his well water for irrigation might have on his neighbor's drinking water. That concern was not confirmed by any corroborating evidence, and the Board concludes that the above WAC does not provide a justification for granting Steffens' Application.

IV

An exemption to the general prohibition is found in WAC 173-513-070:

*(2) Domestic use for a single residence...shall be exempt from the provisions of this chapter if no alternative source is available. If the cumulative effects of numerous single domestic diversions would seriously affect the quantity of water available for instream uses, then only domestic in-house use shall be exempt.*

This WAC presents a two-pronged test for the granting or denial of a water withdrawal permit for domestic uses: first, an applicant will be granted a permit to draw water from Long Lake only if he has no other water source available for his residential use. Secondly, if

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(5)

1 the applicant meets that test but cumulative domestic water  
2 withdrawals would seriously affect the uses of the lake or streams,  
3 the applicant's permit would be limited to in-house uses such as  
4 drinking, bathing, etc., and use for irrigation would be prohibited.

5 V

6 Even though some modifications to increase his pump and/or  
7 storage tank capacity may be required, Steffens has presented no  
8 evidence to show that his well is not an adequate source of water for  
9 his domestic purposes including irrigation. The Board concludes that  
10 Steffens' well is an available alternative source of water for  
11 irrigation and that his Application was properly denied by DOE.

12 VI

13 Having reached the conclusion above, the Board need not consider  
14 the second prong of the test which applies only if an applicant  
15 satisfies the first prong. However, the Board is satisfied that, if  
16 such a decision were necessary, the unrebutted testimony offered by  
17 the Department of Wildlife would be sufficient to show a serious  
18 effect on the Woodland Creek fish population by cumulative withdrawals  
19 of water from Long Lake. The application, if granted, would have to  
20 be limited to in-house uses only with no irrigation use permitted.

21 VI

22 Steffens has indicated his concern over the length of time it  
23 took for DOE to process his Application. The Board may understand not  
24

1 only his frustration with this delay, but also, possibly, that of DOE  
2 which may receive more than 400 applications a year. But, in the  
3 absence of any statutory or regulatory time limitations, consideration  
4 of an agency's performance period is not an issue within the Board's  
5 jurisdiction.

#### 6 VII

7 Steffens further contends that his withdrawal of water from the  
8 Lake would not affect it because the aquifer from which his well is  
9 already drawing water originates from the Lake. However, DOE's  
10 un rebutted testimony was that the aquifer does not originate  
11 exclusively in the Lake but is also fed by ground water. The Board  
12 concludes that, while the source of some of Steffens' well water may  
13 be from the Lake, withdrawal for his contemplated irrigation system  
14 would be exclusively from the Lake thus creating an increase of water  
15 withdrawal over his present system.

#### 16 VIII

17 In summary, the Board concludes that Steffens has failed to  
18 establish that he has no available alternative source of water and,  
19 accordingly, DOE properly denied his Application.

#### 20 IX

21 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
22 adopted as such. From these Conclusions of Law the Board enters the  
23 following

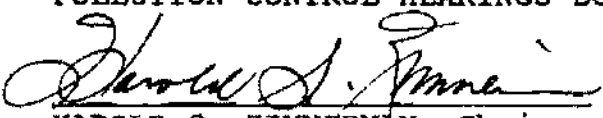
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25 FINAL FINDINGS OF FACT,  
26 CONCLUSIONS OF LAW AND ORDER  
27 PCHB NO. 92-1

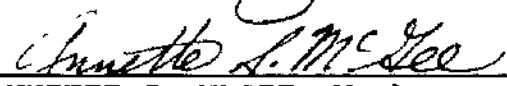
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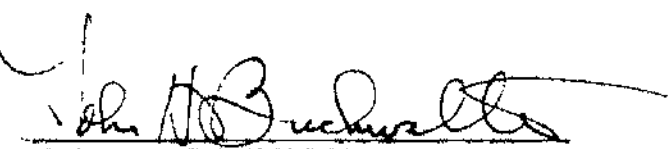
DOE's denial of Appellant's Application for Permit to Appropriate  
Public Waters of the State of Washington, No, S2-27737, is AFFIRMED.

DONE this 16<sup>th</sup> day of April, 1992.

POLLUTION CONTROL HEARINGS BOARD

  
HAROLD S. ZIMMERMAN, Chairman

  
ANNETTE S. MCGEE, Member

  
JOHN H. BUCKWALTER  
Administrative Law Judge, Presiding

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